FOR ARGUMENT

No. 84-1479



IN THE

# Supreme Court of the United States

**October Term, 1985**

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

*Petitioner,*

*against*

JOSEPH ALLAN WILSON,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONER

MARIO MEROLA
District Attorney
Bronx County
215 East 161st Street
Bronx, New York 10451
(212) 590-2060

STEVEN R. KARTAGENER
JEREMY GUTMAN
Assistant District Attorneys
*Of Counsel*

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

No. 84-1479

IN THE

# Supreme Court of the United States

October Term, 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

*Petitioner,*

*against*

JOSEPH ALLAN WILSON,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONER

### POINT ONE

**The Court of Appeals erred in granting Wilson habeas corpus relief where the identical claim had been rejected previously after he had been allowed a full and fair opportunity to litigate that claim on the merits in an earlier habeas proceeding before a different panel of the Court of Appeals, and where there had been no intervening change in the law entitled to retroactive application on habeas corpus and no presentation of any newly-found facts which might have had a material impact on the correctness of the original habeas determination.**

A. In our opening brief, we argued that the Court should announce, in its supervisory capacity over the lower federal courts, a general rule which provides that after a state pris-

oner has had one full and fair opportunity to litigate the merits of a constitutional claim in state court, and then before the federal judiciary on habeas corpus, a subsequent habeas petition by him raising the same ground should be subject to a requirement of mandatory, summary dismissal. This general rule, however, would be qualified by exceptions to presumptive finality in truly extraordinary situations, such as when the petitioner presents newly discovered and previously unavailable favorable facts which would have had an outcome determinative effect on the earlier habeas proceeding, or when there has been an intervening, significant change in the law which the petitioner can demonstrate would be accorded retroactive, collateral application if he were, instead, bringing his petition for habeas relief on for the first time. Respondent has asserted that this rule is unacceptable because it would conflict with this Court's 22-year-old decision in *Sanders* v. *United States*, 373 U.S. 1 (1963), as well as 28 U.S.C. § 2244(b) and habeas corpus Rule 9(b). Respondent also insists that such a rule would violate the Constitution's Suspension Clause (Article I, § 9, cl. 2). However, respondent's points of dispute with the sensible rule we now promote are meritless.*

1. It is true that this new rule of issue preclusion would be at odds with the rule announced previously by this Court in *Sanders* v. *United States, supra,* when, acting in a similar

* Contrary to respondent's further argument (respondent's brief, p. 13), this proposed rule of qualified issue preclusion would in no way conflict with this Court's decision in *Smith* v. *Yeager*, 393 U.S. 122 (1968), since even under our proposed rule Smith would have been allowed to pursue a second habeas action. The original denial of an evidentary hearing, and his newly alleged critical facts (393 U.S. at 124), make clear that Smith had been denied a "full and fair opportunity" to litigate the merits of his constitutional claim on the first habeas application.



supervisory role (373 U.S. at 15), it correctly read 28 U.S.C. § 2244, as it then existed, to establish a three-pronged test governing a court's right to refuse to hear a successive, repetitive habeas corpus petition. The final prong of that statutorily-required analysis provided that a federal court could dismiss a new habeas petition raising a ground previously heard and determined on the merits only when "the ends of justice would not be served by reaching the merits of . . . [the] subsequent petition." 373 U.S. at 15.

However, respondent has all but ignored that it was demonstrated in our opening brief that the *Sanders'* "ends of justice" test, which the Court of Appeals invoked in order to grant relief in this case, was rendered inapplicable to state prisoners by the Congressional amendatory enactments of 1966. At that time, state prisoners were expressly eliminated from the reach of the *Sanders* three-pronged test (now contained in 28 U.S.C. § 2244[a]), and instead relegated to the governing provisions of 28 U.S.C. § 2244(b) and (c). Because *Sanders* is really nothing more than a case of statutory interpretation as it relates to successive, repetitive petition situations, and because the statute addressed in *Sanders* is no longer applicable to state prisoners, it is of little moment that "The State's Proposed Rule Contravenes *Sanders*" (respondent's brief, pp. 15-19).

2. It was shown in our opening brief, based on a review of stated Congressional intent, that the 1966 amendment of and additions to section 2244 were effected in order to introduce "a greater degree of finality of judgments in habeas corpus proceedings" involving state prisoners. Petitioner's brief, pp. 19-20. Indeed, the alteration of the previously-existing statutory provision was undertaken to

inject into federal habeas corpus litigation a concept previously absent—"a qualified application of the doctrine of res judicata." Petitioner's brief p. 20. Respondent, however, argues that the Congressional intent to bring some greater degree of finality to habeas litigation by allowing for application of res judicata principles manifests itself only in section 2244(c), which concerns successive petitions raising issues determined previously on the merits by this Court (respondent's brief p. 20), but not in section 2244(b), which pertains to successive petitions raising claims previously determined on the merits by other, lower federal courts.

Respondent's argument about the Congressional intent in the amendment of section 2244 apparently involves a bit of wishful thinking, but is rendered inaccurate by the express language of the Senate report accompanying the enactment of subsections (b) and (c). In that report, as we noted in our opening brief (petitioner's brief p. 20), it was stated "[t]he purpose of these new *subsections* [(b) and (c)] is to add to section 2244 of title 28, United States Code, provisions for a qualified application of the doctrine of res judicata." S. Rep. 1797, 89th Cong., 2d Sess., *reprinted* in 1966 U.S. Code Cong. & Ad. News 3663, 3664 (emphasis added), Hence, it is evident, contrary to respondent's unsupported speculation, that Congress did intend to incorporate "a qualified application of the doctrine of res judicata" into section 2244(b), and that petitioner's suggested rule of qualified issue preclusion hardly conflicts with that stated goal.

3. Respondent also asserts, quite incorrectly, that when Congress promulgated Rule 9(b) of the habeas corpus rules



in 1976, it made clear that "the three-pronged test of *Sanders* was intact" (respondent's brief p. 21). Rule 9(b) merely provides that "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . ." Nothing contained therein suggests that the "ends of justice" must, as well, be considered. Although, as was pointed out in our opening brief, the Advisory Committee first took historical notice of the original, *Sanders* three-pronged test, the Committee went on to state that

> "[t]he requirement [of Rule 9(b)] is that the prior determination of the same ground is on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since Sanders." (Petitioner's brief pp. 20-21, n.).

Thus, in the end, the Advisory Committee saw fit to liken Rule 9(b) to section 2244(b), without adding that the "ends of justice" test was still extant. Certainly, if "ends of justice" analysis were a further silent, but surviving requirement, as respondent now contends, the Advisory Committee would have said so. Its refusal to make that statement confirms the deletive effect of the 1966 amendment of section 2244(b), adhered to in the enactment of Rule 9(b).

4. The only argument posited by respondent which we did not touch upon at all in our opening brief is his contention (respondent's brief, pp. 23-26) that the qualified rule of issue preclusion we now urge would run afoul of the Constitution's Suspension Clause (Article I, § 9, cl. 2), which provides that

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.

The seeds of respondent's argument are to be found in *Sanders* v. *United States,* 373 U.S. at 11-12, where the Court, citing the Suspension Clause, stated that

> . . . if construed to derogate from the traditional liberality of the writ of habeas corpus, § 2244 might raise serious constitutional questions. *Cf. Fay* v. *Noia, supra,* 373 U.S. at 406.

But respondent's reliance on this brief, speculative suggestion of unconstitutionality in *Sanders,* which cites *Fay* v. *Noia,* is clearly misplaced. For the reference in those cases to the "traditional liberality of the writ of habeas corpus" is brought into serious question by subsequent decisions of this Court, and the research of the legal scholars. *See Swain* v. *Pressley,* 430 U.S. 372, 384-386 (Burger, Ch. J., Blackmun, Rehnquist, JJ., concurring); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 252-256 (1973) (Powell, J., concurring); Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich. L. Rev. 451, 468 (1966); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 463-499 (1963); *see also, United States* v. *Hayman,* 342 U.S. 205, 210-211 (1952).

Without attempting to recapitulate the entire history of the writ of habeas corpus, we believe it to be quite clear that the Constitution's history shows that the framers did not understand the privilege of habeas corpus which they sought to protect by the Suspension Clause to extend to collateral attacks upon criminal convictions issuing from courts of competent jurisdiction. Hence, limitations upon the nature and scope of post-conviction collateral attack do not implicate the Suspension Clause. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 170 (1970).



As evidenced by the Chief Justice's concurring opinion in *Swain* v. *Pressley,* 430 U.S. at 384-386, at least three members of the Court have already expressly announced their agreement with our contention that the Suspension Clause is of no relevance when the issue is one of the expansion or diminution of the scope of federal collateral review of state criminal convictions, which emanates not from the common law, but from Congressional enactments coming long after the Constitution. We urge the entire Court to adopt the eminently sound analysis of that concurring opinion, for the compelling reasons stated therein, and thus reject respondent's ill-conceived constitutional argument.*

B. 1. Respondent's suggestion that his successive, repetitive petition did not raise the "same ground" as his earlier one, because of his reliance on a newly-decided case from this Court, *United States* v. *Henry,* 447 U.S. 264 (1980) (respondent's brief, pp. 26-27), is incorrect. The language of *Sanders* itself makes clear that respondent's repeated contention that the Sixth Amendment was violated by the manner in which his incriminating jailhouse state-

---

* Indeed, to do so would accord with the actions taken by the Court in *Stone* v. *Powell,* 428 U.S. 465 (1976), where the Court substantially limited a state prisoner's opportunity to use federal habeas corpus as a vehicle for raising Fourth Amendment claims. Beyond doubt, the diminution of the availability of habeas corpus effected by *Stone* is far more substantial than the rule which we seek in this case, where a state prisoner's right to obtain one full and fair review of a federal issue on habeas corpus would remain unimpaired. Yet, in *Stone,* there was no suggestion that the Suspension Clause might somehow bar the result reached by the Court. *See also Wainwright* v. *Sykes,* 433 U.S. 72, 87-88 (1977) (no suggestion that Suspension Clause was implicated in narrowing the previously broad scope of review of habeas corpus, in situations where state prisoners failed to comply with contemporaneous objection rules, established by *Fay* v. *Noia,* 373 U.S. 391 [1963]).

ments were obtained is the "same ground" that was raised in his first petition and already rejected by the federal courts on the merits, notwithstanding his newly-added citation to *United States* v. *Henry, supra.* For under *Sanders,* as noted in our opening brief, "identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments . . . ." 373 U.S. at 16.*

2. In our opening brief we argued that even if a residual "ends of justice" exception to finality continued to exist following the 1966 amendment of section 2244(b), its application should now be guided by Congress' intent to bring a "greater degree of finality" and a "qualified application of the doctrine of res judicata" to habeas corpus litigation (petitioner's brief, pp. 33-34). Hence, we argued that our suggested qualified rule of issue preclusion should be the appropriate objective standard by which "ends of justice" determinations are to be made. This contention was founded in part on our analysis of Congressional intent, but was also made with an eye toward the increasing recognition by this Court that the lack of finality in habeas litigation involving state prisoners has had a serious negative impact on federal-state relations and on our system of justice (petitioner's brief, pp. 25-27, 33-34).

Respondent, however, has drawn liberally upon decisions of this Court rendered at a time when the scope of

* "For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion." 373 U.S. at 16.



habeas corpus review was at its broadest* to offer a divergent "ends of justice" analysis which pays no more than lip service to the pressing need for finality in habeas corpus litigation. In its distilled essence, respondent's argument suggests that whenever a subsequently-rendered decision of this Court, or a Federal Court of Appeals, contributes a new nuance to an issue of constitutional law previously heard and determined on the merits in an earlier habeas proceeding, a *de novo,* plenary reconsideration of the issue in a new habeas corpus action is warranted. In reality, respondent advocates an approach pursuant to which there would hardly ever be any real finality in habeas corpus litigation.

History and practical experience have shown us that constitutional criminal law is an ever-changing dynamic form, and that new decisions will often cast some doubt upon the absolute correctness of an earlier-rendered decision; in many instances no great skill is required to find a "differential basis" (*see* respondent's brief, pp. 33-34) in a recent decision that might serve to justify some criticism, or even a cry of "plain error" (*see* respondent's brief, pp. 32-33), concerning an earlier decision that had been rendered without the benefit of the most recent explication on a particular legal principle. But in an orderly and rational system of jurisprudence the curtain of finality must at some time fall. Perpetual, repetitious assaults on the validity of a state criminal conviction, predicated upon

* *E.g. Kaufman* v. *United States,* 394 U.S. 217 (1969) (resp. br. pp. 26, 28-29). Respondent ignores the fact that the holding and rationale of *Kaufman* were subsequently eviscerated by this Court's decision in *Stone* v. *Powell,* 428 U.S. 465, 479-481 (1976). Indeed, Justice Brennan, in his dissenting opinion in *Stone* v. *Powell,* succinctly observed that "*Kaufman* obviously does not survive." 428 U.S. at 519, n.14.

the most recent advance sheets and slip opinions, cannot be countenanced. "Absolute" truth and justice are too elusive to permit the constant re-evaluation of the correctness of earlier-issued decisions, particularly when the price to be paid involves the substantial costs to society attending the lack of finality of state criminal convictions.

In the context of this case it is particularly significant that the present argument is being heard more than 15 years after the murder of Sam Reiner, despite the fact that respondent's guilt was overwhelmingly established at trial even without regard to the jailhouse admissions in question, and his claimed constitutional error in no way impugns the accuracy of the jury's finding of guilt. Notwithstanding respondent's claims of "plain error" with respect to the earlier federal court rulings, and his reliance upon new legal precedent which offers him some support for his current constitutional arguments, on balance the "ends of justice" would have been best served by the final conclusion of this habeas corpus litigation long before now.

## POINT TWO

**The state court's fully supported factual finding that Wilson's statements were spontaneous and unsolicited distinguishes the present case from *United States* v. *Henry*, as well as *Maine* v. *Moulton*.**

As argued in the brief for petitioner, the Court of Appeals erroneously concluded that respondent Wilson's incriminating statements were "the product of" his conversations with Benny Lee because it ignored the uncontradicted hearing testimony that Wilson's statements were



made following a disturbing visit from Wilson's brother. Rather than confront that testimony, Wilson, mimicking the Court of Appeals' purblindness, offers a comparison of the present case and *United States* v. *Henry*, 447 U.S. 264 (1980), in which every parallel aspect is emphasized and magnified, while the pronounced differences between the two cases are ignored or wished away. When the relevant portions of the record are viewed in their entirety and without distortion, however, it becomes clear that Wilson's case is constitutionally distinguishable from *Henry* and that *Henry* does not support Wilson's claim of entitlement to habeas corpus relief. It should further be recognized that this Court's recent opinion in *Maine* v. *Moulton*, 54 U.S.L.W. 4039 (Dec. 10, 1985), offers no support to Wilson's theory that his right to counsel was violated.

Wilson's effort to reshape the present case begins with his characterization of the state hearing court's decision. Notwithstanding the court's reference to "the fact that the defendant's utterances in Lee's presence were spontaneous *and* not a result of any interrogation by Lee" (J.A. 63) (emphasis added), and its declaration that "the Court finds beyond a reasonable doubt that the utterances made by defendant to Lee were unsolicited" (J.A. 63), Wilson insists that the state court "made only one factual finding that it considered determinative, that Lee . . . did not 'interrogate' Wilson" (respondent's brief, p. 34). Wilson claims that the hearing court's discussion of two New York cases, *People* v. *Mirenda*, 23 N.Y.2d 439 (1969), and *People* v. *Kaye*, 25 N.Y.2d 139 (1969), supports this constricted interpretation of the court's finding (respondent's brief, pp. 34-35). On the contrary, however, although the hearing court, in distinguishing the facts of the present

case from those of *Mirenda,* noted that in *Mirenda,* unlike the present case, there was interrogation by the cellmate, the court did not indicate that it viewed the presence or absence of interrogation as the single dispositive factor in that case. Indeed, it quoted a passage from *Mirenda* that stated a much broader holding: "Statements made by a cellmate to another deliberately placed by the prosecution in proximity to the defendant in order to get statements would be a violation of a defendant's rights." *Mirenda,* 23 N.Y.2d at 449, quoted at J.A. 63. The quoted passage in turn cited *People* v. *Robinson,* 13 N.Y.2d 296 (1963), a case in which the New York Court of Appeals held that a cellmate violated a defendant's right to counsel when, pursuant to a scheme conceived by the police, he "engaged [the defendant] in a conversation which was overheard by the police." 13 N.Y.2d at 300. Thus, the hearing court's discussion of *Mirenda* reflects its awareness that, under the controlling law, Wilson's statements could not be admitted into evidence if they were the product of deliberate elicitation by the police, regardless of whether or not there was "interrogation."

Because of that awareness, the court's determination that Wilson's case was distinguishable from *Mirenda* necessarily required an additional factual finding. Accordingly, when the hearing court, immediately after referring to *Mirenda,* stated that it was "persuaded by the fact that the defendant's utterances in Lee's presence were spontaneous and not a result of any interrogation by Lee" (J.A. 63), it was certainly referring to the finding of spontaneity as a separate and independently determinative fact. The court's ensuing discussion of *People* v. *Kaye,* in which the issue before the New York Court of Appeals was



"whether defendant's *spontaneous* oral confession must be suppressed, as a matter of law, solely because defendant was under arrest and represented by counsel at the time he volunteered his confession'"* [25 N.Y.2d at 143 (emphasis added)], further demonstrates the importance of the factual finding of spontaneity to the state court's ultimate conclusions (J.A. 63).

Wilson has coupled his misreading of the scope of the state court's factual determinations with an effort to confuse those findings with mixed questions of law and fact that are not subject to the presumption of correctness under 28 U.S.C. § 2254(d). Wilson thus belabors the uncontroverted proposition that the issue of "deliberate eliciting" is a mixed question (respondent's brief, pp. 43-47), while refusing to recognize that the underlying finding that Wilson's statements were spontaneous and unsolicited involves a determination of historical fact. As this Court recently noted, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller* v. *Fenton,* 54 U.S.L.W. 4022, 4025 (Dec. 3, 1985). Thus, the finding that the statements were "spontaneous" and "unsolicited," though closely intertwined with the ultimate constitutional issue of "deliberate eliciting," is a finding of fact, not law.

The purely factual nature of "spontaneity" is highlighted by comparing it with "voluntariness," which the Court recognized in *Miller* as a mixed question of law and fact. The Court noted that the term "involuntary" is a "convenient shorthand" for a legal determination based on application of this Court's precedents—a determination

* As the quoted passage indicates, Wilson's assertion that *Kaye* did not involve the Sixth Amendment right to counsel (respondent's brief, p. 35, n.34) is incorrect.

that involves analysis of whether the "tactics for eliciting inculpatory statements . . . fall within the broad constitutional boundaries" and not simply "whether the defendant's will was in fact overborne." 54 U.S.L.W. at 4024, 4025. Since no equivalent body of case law or constitutional principle is superimposed on the concept of "spontaneity," it is clear that a determination that a statement is spontaneous and unsolicited involves only an examination of historical causes and effects. Thus, the state court's findings in this case are entitled to the presumption of correctness pursuant to 28 U.S.C. § 2254(d).

Wilson's argument, however, would not only permit the federal courts to disregard the state hearing court's findings, but to pick and choose among the evidence in the record to fashion a version of the underlying events that conforms to the legal theory he advances. In the brief for petitioner, the State took issue with the Court of Appeals' reliance on testimony that was elicited only at trial and, therefore, was not considered by the hearing court as a basis for its decision (petitioner's brief, p. 41n.). Wilson answers the State's assertion that the evidence comprised in that testimony was never "fairly presented" to the state court with regard to the suppression issue by suggesting that there is a hitherto-unrecognized "paraphrase" exception to the doctrine of exhaustion of state remedies, under which testimony that was not fairly presented to the state court may nevertheless be considered by the federal court if it is similar to testimony that was properly before the state court (respondent's brief, p. 39, n.36). Wilson, however, does not hold himself even to his own flimsy "paraphrase" standard; rather, he liberally refers to trial evidence regarding Lee's prior experience as an informant that has no counterpart in the hearing testimony (*see* respondent's brief, p. 40). Indeed, Wilson goes so far as to rely on trial evidence to insinuate that, contrary to his hearing testimony, Lee was in fact paid for informing in the present case. *See* respondent's brief, p. 40, n.37 ("After providing Cullen with incriminating information against Wilson, Lee *unexplainedly* acquired the $10,000 bail that had been set in his case . . ." [emphasis added]). Had Wilson ventured somewhat further into the trial testimony, however, he would have noted that the acquisition of Lee's bail money was explained by Lee's testimony that his father raised the funds (J.A. 111).



Wilson's willingness to go beyond the hearing record when it suits his purposes renders particularly ironic his reluctance to address the evidence regarding the jailhouse visit by Wilson's brother. Even if Wilson were justified in his sweeping assertion that the "supposed connection between the visit of Wilson's brother and the statements Wilson made played no part in the hearing court's decision" (respondent's brief, p. 5, n.2), the evidence of that visit and its effect on Wilson was undeniably part of the record before the hearing court and, therefore, surely warrants no less attention by a habeas corpus court than the post-hearing evidence, which Wilson does not hesitate to point out to this Court. Moreover, notwithstanding the absence of a specific reference to the brother's visit in the state court's cursory one-paragraph summary of the facts (J.A. 62), that incident implicitly underlies the court's finding that Wilson's statements were spontaneous. Wilson additionally protests that "there is no testimony that this visit *caused* Wilson to alter his version of the events of July 4" (respondent's brief, p. 4) (emphasis in original). The absence of testimony establishing causation did not, however, prevent Wilson from asserting that Lee's "pro-

vocation'' caused Wilson to inculpate himself (respondent's brief, p. 39). Surely, it is incongruous that, while Wilson is willing to suggest that Lee's remarks upon hearing Wilson's initial exculpatory statement prompted the incriminating statements Wilson made several days later, he does not deign to comment on the effect of the intervening visit from Wilson's brother.

Furthermore, Wilson's assertion that a sustained objection prevented the prosecution from adducing the connection between the brother's visit and Wilson's second, inculpatory, version of the events of July 4, 1970 (respondent's brief, p. 5, n.4), is belied by the record. At the hearing, the following colloquy occurred:

> Q. [by the prosecutor] Now, Mr. Lee, during the course of this second story that the defendant gave to you, you testified that you did not question the defendant, tell his Honor how this defendant came about telling you that second story during that two or three day period after the first day that you were together in the cell.
>
> Mr. Adler: That's objected to if your Honor pleases.
>
> The Court: Objection overruled.
>
> A. The defendant had a visit from his brother.
>
> The Court: Beg pardon? I didn't hear that.
>
> The Witness: A visit from his brother.
>
> The Court: All right.
>
> The Witness: And he was upset over the fact that his brother had come and said that his family was saying that he had killed Sam and why did he kill Sam *and this upset him very much and that would start him to talking about different things, about the crime and different things.* [J.A. 41-42]. (Emphasis added).



Clearly, the fact of Wilson's brother's visit and its relation to his subsequent incriminating statements is an integral part of the hearing evidence and Wilson's struggle to disregard it reflects his recognition of its fatal impact on his legal theory.

As Wilson observes, *Henry* requires ''objective consideration of the steps the government took to create a situation intended to induce the accused to confess and the likelihood that, under the circumstances, the government's strategem would have that effect'' (respondent's brief, p. 38). Wilson fails, however, to face the evidence that, in the present case, it was not the state's strategem, but an independent, intervening factor that had the effect of inducing Wilson to discuss his involvement in the crime. Because of that crucial distinction, the record in the present case does not support the conclusion that the incriminating statements were the ''product'' of the state's conduct. *Cf. Henry,* 447 U.S. at 271.

Where the actual stimulus for the inculpatory statements is known, it becomes unnecessary to analyze the ''likelihood'' that steps taken by the state would create a situation that might have such an effect. While *Henry* required exclusion of statements obtained because of the Goverment's intentional creation of a situation likely to induce the accused to make incriminating statements in the absence of counsel [*see* 447 U.S. at 274], it did not require exclusion of statements prompted by factors that are independent of and attenuated from such intentional and knowing conduct by the Government. *See Henry,* 447 U.S. at 276-77 (Powell, J. concurring).

Nor does the Court's recent opinion in *Maine* v. *Moulton,* 54 U.S.L.W. 4039 (December 10, 1985). There the Court held that the admission at trial of statements made to the

indicted defendant's codefendant, who was secretly cooperating with the police and wearing a recording device, violated Moulton's Sixth Amendment rights. The Court specifically noted that the statements in question were the product of the codefendant's prompting:

> Because Moulton thought of Colson only as his codefendant, Colson's engaging Moulton in active conversation about their upcoming trial was certain to elicit statements that Moulton would not intentionally reveal—and had a constitutional right not to reveal—to persons known to be police agents. Under these circumstances, Colson's merely participating in this conversation was "the functional equivalent of interrogation." *Henry,* 447 U.S. at 277 (Powell, J., concurring). In addition, the tapes disclose and the Supreme Judicial Court of Maine found that Colson "frequently pressed Moulton for details of various thefts and in so doing elicited much incriminating information that the State later used at trial." 481 A.2d at 161. Thus, as in *Henry, id.*, at 271 n.9, we need not reach the situation where the "listening post" cannot or does not participate in active conversation and prompt particular replies. 54 U.S.L.W. at 4044, n.13.

In *Moulton,* the Court recognized that "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." 54 U.S.L.W. at 4044.

When the present case is viewed in light of all the facts fairly supported by the record, and only such facts,* it is

* It should be noted that Wilson has not pointed to any support in the record for the factual portions of the Court of Appeals' opinion challenged in the brief for petitioner at pages 40-42. Although Wilson attempts to dismiss this discussion as pertaining to a mere "four sentences" of the opinion [respondent's brief, p. 42, n.38], the State maintains that the four sentences in question effect a thorough distortion of the facts involved in the present case.



clear that, unlike Moulton and Henry, Wilson was not confronted by an undisclosed agent whom law enforcement authorities "must have known" [*see Henry,* 447 U.S. at 271; *Moulton,* 54 U.S.L.W. at 4043], was likely to induce discussions about his pending criminal charges. In *Moulton,* the police knew that such discussions were inevitable because that was the express purpose for the planned meeting. *Moulton,* 54 U.S.L.W. at 4044. In *Henry,* the existence of a contingent-fee arrangement whereby the informant would be paid only for producing useful information made it inevitable that the informant would "take affirmative steps to secure incriminating information." *Henry,* 447 U.S. at 271. In the present case, however, there was no prior relationship between Lee and Wilson relating to the crime at issue that would render it inevitable or even likely that Wilson would discuss the facts of that crime with Lee, nor is there any evidence of special incentives that would inevitably lead Lee to prompt such a discussion.

Moreover, the record makes clear that Wilson's initial remarks about the crime were prompted by the happenstance of his being upset by the view from his cell window of the Star Taxicab Garage, the location where he murdered Sam Reiner.* Although Lee did not remain silent upon hearing Wilson's exculpatory story, his comments to the effect that the story "didn't sound too good" (J.A. 39), would seem more likely to induce a more convincing *exculpatory* statement than to provoke Wilson to admit his

* Contrary to Wilson's assertion [respondent's brief, p. 42, n.38], his becoming upset by the view of the scene of the crime was not a "factor in the control of the police" in any direct sense. There is nothing in the record to support the theory that the fact that the nearby garage was visible from the cell window and the fact that seeing it dramatically upset Wilson were anything more than happenstance.

guilt to his cellmate. In any event, the record makes clear that those remarks had neither effect, because Wilson "stuck to the story" (J.A. 39). Wilson only began talking about the crime again when another happenstance—the visit during which his brother communicated how distraught their family was over Wilson's role in causing Sam Reiner's death—caused Wilson again to become upset. Thus, the present case, unlike either *Henry* or *Moulton*, involves a situation in which an informant, though placed in proximity to the defendant, did not actually prompt the defendant to make the incriminating statements that were introduced against him at trial. For the reasons advanced in the State's opening brief, the use of those statements comported with the Sixth Amendment right to counsel.

## Conclusion

**The judgment of the United States Court of Appeals for the Second Circuit should be reversed.**

Respectfully submitted,

MARIO MEROLA
District Attorney
Bronx County
*Counsel for Petitioner*

STEVEN R. KARTAGENER
JEREMY GUTMAN
Assistant District Attorneys
*Of Counsel*

January, 1986